The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOARING HELMET CORPORATION, a Washington corporation, Plaintiff, v. NANAL, INC., d/b/a LEATHERUP.COM, a Nevada corporation, Defendant.	No. C09-789-JLR DEFENDANT NANAL, INC.'S MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: November 26, 2010

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"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Granting summary judgment to Defendant Nanal, Inc. on Plaintiff Soaring Helmet Corporation's claims fulfills this beneficial purpose as Plaintiff cannot marshal sufficient probative evidence to prove its allegations as a matter of law. Notwithstanding the undisputed fact that Defendant long ago took steps to address Plaintiff's expressed concerns, Plaintiff has continued to press this action through discovery that yielded no support for the allegations in Plaintiff's complaint. Thus, for the reasons discussed herein, Nanal respectfully requests that the Court grant Nanal's motion for summary judgment.

I. FACTS.

Nanal, a Nevada corporation formed in 2005, owns and operates the website LeatherUp.com, which promotes and sells motorcycle apparel, such as jackets, boots, helmets and vests, and motorcycle accessories and parts direct to consumers. (Declaration of Albert Bootesaz in Support of Defendant Nanal, Inc.'s Motion for Summary Judgment ("Bootesaz Decl.") ¶ 3; Declaration of Stacia N. Lay in Support of Defendant Nanal, Inc.'s Motion for Summary Judgment ("Lay Decl.") ¶ 19, Exh. 18 (pp. 207-08, 210-12).) As part of its marketing for LeatherUp.com, Nanal uses Google AdWords, which allows advertisers to select keyword terms that will, when used to conduct a search using Google's search engine, trigger "Sponsored Links" for the advertiser. On about September 1, 2008, Nanal purchased the keywords "vega helmets" through Google AdWords. (Bootesaz Decl. ¶ 4; Lay Decl. ¶ 10, Exh. 9 (p. 157).) The keywords were generated by Google's automated keyword suggestion tool, which suggests keywords based on user input; Nanal input the generic term "helmet" and the tool suggested "vega helmets." (Bootesaz Decl. ¶ 4; Lay Decl. ¶ 10, Exh. 9 (p. 157), ¶ 19, Exh. 18 (pp. 213-14).) At the time, Nanal's president, Albert Bootesaz, believed "Vega" referred to a solar system or a star. (Bootesaz Decl. ¶ 4; Lay Decl. ¶ 19, Exh. 18 (pp. 207, 214-15).) Nanal ceased using the word "Vega" on about April 3, 2009; in the brief time the keyword was used, the ad generated only 2,457 "clicks." (Lay Decl. ¶ 10, Exh. 9 (pp. 157, 161); Bootesaz Decl. ¶ 6.)

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Plaintiff filed its initial complaint on June 9, 2009, against Google, Inc. and Bill Me, Inc. "d/b/a Leatherup.com." (Docket No. 1.) Plaintiff apparently subsequently realized it had named the wrong defendant and filed a First Amended Complaint on July 27, 2009, this time naming as defendants Google[1] and Nanal, Inc., d/b/a LeatherUp.com. (Docket No. 9.) Plaintiff's First Amended Complaint alleged claims for trademark infringement, false designation of origin, false advertising and "unfair competition" under the Lanham Act, unfair competition under Washington's Consumer Protection Act and tortious interference with prospective economic advantage. (Lay Decl. ¶ 2, Exh. 1.) All of the claims were based on the allegation that Nanal's purchase of the keywords "vega helmets" through Google AdWords violated Plaintiff's rights in its registered trademark VEGA, Reg. No. 2,087,637 for "motorcycle helmets." (Lay Decl. ¶ 2, Exh. 1 (pp. 7, 9-10, 20).)

Nearly a year after filing its First Amended Complaint, Plaintiff filed a Second Amended Complaint on May 13, 2010. (Docket No. 48.) The Second Amended Complaint alleged the same causes of action and was again based upon Plaintiff's alleged rights in its registered trademark VEGA, Reg. No. 2,087,637 for "motorcycle helmets." (Lay Decl. ¶ 7, Exh. 6 (pp. 58, 71).) With respect to the Google AdWords keywords, Plaintiff's allegations were largely the same as those made in the First Amended Complaint except Plaintiff now alleged similar use with respect to the Bing and Yahoo! search engines:

> 4.4 In approximately April 2009, Plaintiff learned that when the query "VEGA helmets" is searched via internet search engines, including but not limited to the Google, Yahoo, and Bing search engines, an advertisement appeared under the search engines' sponsored listings that stated that Leatherup.com offered "50% off Vega Helmets." . . .
>
> 4.7 Defendant's advertisement was false and misleading because Defendant does not in fact sell any of Soaring Helmet's VEGA products.
>
> 4.8 Soaring Helmet has lost business due to actual confusion caused by Defendant's false and misleading advertisement when at least one retailer refused to do business with Soaring Helmet due to the fact that the advertisement falsely stated that Defendant sells Soaring Helmet's products at a deep discount.

(Lay Decl. ¶ 7, Exh. 6 (p. 60.) Nanal has never purchased the keyword "Vega" in connection

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[1] On October 15, 2009, after Google had filed a motion to dismiss, Plaintiff filed a notice of voluntary dismissal of its complaint against Google. (Docket Nos. 12, 32.)

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with any advertising program offered by the Bing or Yahoo! search engines. (Bootesaz Decl. ¶ 7; Lay Decl. ¶ 19, Exh. 18 (p. 216).)

Plaintiff acknowledged in the Second Amended Complaint that Nanal had already stopped using the word "Vega" in connection with Google AdWords, (Lay Decl. ¶ 7, Exh. 6 (p. 61)), a fact that Google confirmed:

> On August 24, 2009, Leatherup.com changed its AdWords account terms to halt use of any keywords that included the word "Vega." Further, Leatherup.com made "Vega" and "Vega helmets" as negative keywords. As a result, Leatherup.com's advertisements do not appear when "Vega" is entered as a search query using Google.com.

(Lay Decl. ¶ 3, Exh. 2 (p. 33).) Nanal's president similarly confirmed that Nanal pro-actively changed its Google AdWords campaign to address Plaintiff's alleged concern:

> 4. As soon as I learned of the demand [in Plaintiff's cease and desist letter], I modified the LeatherUp.com online advertising so that VEGA did not appear in proximity to LeatherUp.com ads. Consequently, LeatherUp.com's advertisements do not appear as Sponsored links with VEGA or Vega Helmets or Vega with any other word combination. I believed that LeatherUp.com had complied with Soaring Helmet's demand.
>
> 5. However, two or three weeks later we again heard from Soaring Helmet's counsel who claimed that a LeatherUp.com ad appeared with a search for "VEGA." After that, in about August 2009, I modified the Google AdWords campaign of Leatherup so that our ads do not appear with a search for "VEGA." Our advertising settings have been modified so our advertisements do not appear when Vega is searched alone or together with some other word. We incorporated an instruction "not Vega." Again, I believed that LeatherUp.com had complied with Soaring Helmet's complaint.

(Lay Decl. ¶ 4, Exh. 3 (p. 36); *see also* Bootesaz Decl. ¶ 5.)

Plaintiff's Second Amended Complaint also alleged for the first time that Nanal had used the "designation" "XElement Extreme Vega" on its website in connection with a motorcycle jacket:

> 4.11 On or about December 2009, Soaring Helmet discovered that Defendant was selling motorcycle jackets under the designation, "XElement Extreme Vega." Soaring Helmet discovered the infringement when one of Soaring Helmet's clients inquired as to whether Soaring Helmet was the manufacturer of the "XElement Extreme Vega" jacket.

(Lay Decl. ¶ 7, Exh. 6 (p. 61).) The claims regarding the Xelement jacket were again based upon Plaintiff's VEGA trademark, Reg. No. 2,087,637 for "motorcycle helmets." (Lay Decl. ¶ 6, Exh. 5 (p. 51), ¶ 7, Exh. 6 (pp. 58, 62, 80-87).) Plaintiff also alleged that Nanal had "removed

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the 'Vega' designation from its motorcycle jackets" but claimed to have "been damaged by Defendant's past infringing sales, and the actual confusion that occurred with at least one of Soaring Helmet's clients." (Lay Decl. ¶ 7, Exh. 6 (pp. 61-62).)

II. ARGUMENT.

A. Summary Judgment Standard.

Summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of its claim because there can be no genuine issue of material fact where there is a complete failure of proof. *Celotex*, 477 U.S. at 323-24; *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1065 (C.D. Cal. 2002). Thus, if the moving party has shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, summary judgment is appropriate. FED. R. CIV. P. 56(c)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Although justifiable inferences are to be drawn in its favor, the nonmoving party cannot meet its summary judgment burden by relying on the mere allegations of the pleadings or by "simply show[ing] that there is some metaphysical doubt as to the material facts." *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Rather, it must present affirmative evidence of specific facts demonstrating genuine issues for trial. *Anderson*, 477 U.S. at 256-57. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. Evidence that is "merely colorable" or is not "significantly probative" cannot defeat summary judgment. *Anderson*, 477 U.S. at 249-50.

Summary judgment is no less available in trademark actions than any other action where, as here, the issues may be decided as a matter of law. *See, e.g., Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002); *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1144 (C.D. Cal. 1998) ("[T]he Ninth Circuit has recognized that a court can determine as a matter of law that a plaintiff cannot demonstrate a 'likelihood of confusion.'"), *aff'd*, 296 F.3d 894 (9th Cir. 2002).

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B. Plaintiff Cannot Establish a Violation of the Lanham Act With Respect to its VEGA Mark for Motorcycle Helmets As a Matter of Law.

As designated, Plaintiff's first and second causes of action allege, respectively, trademark infringement under 15 U.S.C. § 1114 and false designation of origin and "unfair competition" under 15 U.S.C. § 1125(a) of the Lanham Act. (Lay Decl. ¶ 7, Exh. 6 (pp. 62, 64).) The same "likelihood of confusion" test applies to both of these claims. *Lahoti v. Vericheck, Inc.*, No. C06-1132JLR, 2007 WL 2570247, at *7 n.11 (W.D. Wash. Aug. 30, 2007), *aff'd*, 586 F.3d 1190 (9th Cir. 2009); *Mattel*, 28 F. Supp. 2d at 1144 n.30.

The Ninth Circuit has identified "eight factors to facilitate the [likelihood of confusion] inquiry: (1) strength of the mark; (2) proximity or relatedness of the goods; (3) similarity of sight, sound and meaning; (4) evidence of actual confusion; (5) marketing channels; (6) type of goods and purchaser care; (7) intent; and (8) likelihood of expansion." *Dreamwerks Prod. Group, Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998). The factors are not intended to be either exhaustive or exclusive and the Ninth Circuit has cautioned against rigid adherence to them.[2] *Dreamwerks*, 142 F.3d at 1129 ("The factors should not be rigidly weighed; we do not count beans."); *Eclipse Assocs. Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1118 (9th Cir. 1990); *Mattel*, 28 F. Supp. 2d at 1144 (court may take other variables into account depending on the particular facts of the case). "Likelihood of confusion requires that confusion be probable, not simply a possibility." *Rodeo Collection, Ltd. v. W. Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987).

Plaintiff's second cause of action is also captioned in part as one for "false advertising" and the term "false advertising" is referenced in subsequent allegations but Plaintiff does not clearly plead the elements of such a claim nor did it address those elements in its discovery

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[2] Notwithstanding its own admonitions to avoid a rigid, mechanical application of the factors, some Ninth Circuit cases have stated that three factors will always be the most important in cases involving the Internet. *See, e.g., Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 942 (9th Cir. 2002) ("We have held that 'in the context of the Web,' the three most important . . . factors . . . are (1) the similarity of the marks, (2) the relatedness of the goods or services, and (3) the parties' simultaneous use of the Web as a marketing channel.") (quoting *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000)). But *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, the case relied upon for this so-called "Internet trinity," did not hold that these three factors would *always* be the most important in every Internet case but rather that they were "the most important *in this case*." 174 F.3d 1036, 1054 n.16 (9th Cir. 1999) (emphasis added). That case-specific conclusion came after the court's cautionary statement that it "must be acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach." *Brookfield*, 174 F.3d at 1054.

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responses. (*See, e.g.*, Lay Decl. ¶ 7, Exh. 6 (pp. 64-65), ¶ 9, Exh. 8 (pp. 120-29).) Nevertheless, to prove a claim for false advertising under the Lanham Act, Plaintiff must establish:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (footnote omitted).

1. Keyword Advertising and Requirement of Trademark Use in Commerce.

Both Lanham Act sections upon which Plaintiff's first two causes of action are based, Sections 35 and 43(a), require Plaintiff to prove Defendant "used" a mark in commerce in a manner likely to cause confusion. The Ninth Circuit has not explicitly decided whether keyword advertising constitutes trademark use in commerce under the Lanham Act and there is a split in authority on the issue. *See Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1024 (9th Cir. 2004) (stating in "keying" case that "use" element was not disputed); *see also Hearts on Fire Co. v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 281-83 (D. Mass. 2009) (discussing split and citing cases). Regardless, courts have clearly stated that a finding of such use says nothing about the ultimate issue necessary for liability, namely, whether the use is likely to cause relevant confusion. *See, e.g., Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 130 (2d Cir. 2009) ("Needless to say, a defendant must do more than use another's mark in commerce to violate the Lanham Act."); *Hearts on Fire*, 603 F. Supp. 2d at 283 ("use" prong "is only one element of trademark infringement and does not constitute a violation in and of itself").

2. Trademark Infringement and False Designation of Origin.

Plaintiff's claims for trademark infringement and false designation of origin share a common fatal flaw—a lack of evidentiary support. Plaintiff alleges a likelihood of confusion between its VEGA mark for motorcycle helmets and Defendant's use of the keyword "Vega" and alleged use of the "designation" "Xelement Extreme Vega" in connection with the motorcycle jacket. But Plaintiff has no evidence establishing that there is a reasonable

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probability that confusion existed—no expert evidence, no survey evidence, nothing more than Plaintiff's naked allegation that confusion was possible based solely on use of the word "Vega." In the face of this evidentiary vacuum, summary judgment in Defendant's favor is appropriate.

a. Xelement Branded Motorcycle Jacket.

As to Plaintiff's allegation that Defendant used the word "Vega" in connection with the Xelement motorcycle jacket, Plaintiff cannot establish that it was a trademark use of the word in the first instance or that a likelihood of confusion existed even assuming trademark use. *See Horphag Research Ltd. v. Pellegrini*, 337 F.3d 1036, 1040 (9th Cir. 2003) (to establish trademark infringement "a plaintiff must establish that the defendant is using a mark 'confusingly similar' to the protectable trademark of the plaintiff").

Plaintiff's claim fails to address the issue of whether the alleged use of the word "Vega" on the website screenshot attached to Plaintiff's complaint is a trademark use of the word. "Vega" is "[t]he brightest star in the constellation Lyra." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at p. 1386 (11th ed. 2003) (Appendix A). Thus, because "Vega" is an existing word separate and apart from Plaintiff's trademark registration for the word for "motorcycle helmets," the mere use of that word does not necessarily equate with a trademark use. Considered in the context of the website screenshot, it is clear the word "Vega" is not functioning as a trademark. The word is buried in a descriptive sentence after the Xelement brand and immediately before the terms "Black and Gray," suggesting a descriptive reference to the color of the jacket. (Lay Decl. ¶ 14, Exh. 13.) The descriptive sentence also concludes with the statement "by Xelement," the Xelement logo appears underneath additional product pictures and other Xelement products are pictured on the page, all of which reinforces the fact that the relevant trademark is "Xelement." (Lay Decl. ¶ 14, Exh. 13.)

On the analogous question of whether a specimen shows trademark use for purposes of registration, the Trademark Trial and Appeal Board has concluded that similar use on a website did not demonstrate trademark use:

CondomToy condom is not so prominently displayed in the website that

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> customers will easily associate the mark with the products. While the mark is printed in bold type, so are the terms "**natural beautiful curves**," "**CRAZY sexual friction!**" and "**my favorite**." Under these circumstances, prospective customers are likely to view the term "CondomToy" as a descriptive term, advertising puffery, or merely informational (*e.g.*, INSPIRAL condoms have "natural beautiful curves," provide "Crazy sexual friction," and are "my favorite" condom, as well as being a "CondomToy"), rather than as a trademark. Specifically, because the mark **CondomToy condom** appears as part of the sentence, "That's why Inspiral is also called a **CondomToy**® condom," the commercial impression that is conveyed, particularly because of the use of the indefinite article "a" before **CondomToy**® condom, is that **CondomToy condom** is a descriptive term for condoms sold under the Inspiral trademark. Unlike the mark in the *Dell* case where the mark at issue was set out from the surrounding text as the first word in a bullet list, **CondomToy condom** is not so prominent that consumers will recognize it as a trademark for condoms. In fact, viewers of the webpage will have to search through the descriptive text even to find the purported mark.

In re Osterberg, 83 U.S.P.Q.2d 1220, 2007 WL 616032, at *3 (TTAB 2007) (footnote omitted). *See also In re Brunswick Corp.*, Serial No. 78875524, 2008 WL 4155515, at *4 (TTAB Aug. 28, 2008) ("The mere fact that a designation appears on the specimens of record does not make it a trademark[.]") (internal quotation marks omitted); *In re Supply Guys, Inc.*, 86 U.S.P.Q.2d 1488, 2008 WL 618622, at *9 (TTAB 2008) ("[T]here is no per se rule that any use of a mark on a website is trademark use for all goods sold on that web page."). Similarly, Plaintiff cannot show that in the context described above, the alleged use of the word "Vega" was a trademark use.

But even assuming that Plaintiff could establish such use, Plaintiff still cannot demonstrate a likelihood of confusion with respect to that alleged use. Even after full discovery, Plaintiff's allegations in purported support of its first two causes of action for trademark infringement and false designation of origin have not advanced appreciably since Plaintiff's Second Amended Complaint, when it first made the allegations regarding the Xelement jacket. In response to later interrogatories asking Plaintiff to specify in detail the factual basis for its allegations, Plaintiff provided only generalized, conclusory allegations, similar in kind to those in its Second Amended Complaint, without any evidentiary support such as expert testimony or survey evidence. For example, after reciting the likelihood of confusion factors, Plaintiff's factual basis for its allegation of trademark infringement with respect to the Xelement jacket consisted only of the following:

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> Soaring Helmet's products and those of Defendant are directly competitive, as both parties market and sell motorcycle jackets and accessories. Further, Defendant's use of VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark. Purchasers of the parties' products are unlikely to exercise a high degree of care, since the products are not prohibitively expensive for the average consumer. Soaring Helmet has not yet been able to conduct discovery with regard to the issues of the marketing channels used, Defendant's intent, and evidence of actual confusion.

(Lay Decl. ¶ 9, Exh. 8 (p. 119).) And as to its false designation claim, without clearly distinguishing between the allegations regarding the Xelement jacket and those regarding the Google AdWords keywords, Plaintiff's statement of the factual basis for its claim is as follows:

> In this case, Defendant should not have siphoned the goodwill associated with Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false pretense that it sold Plaintiff's products. Consumers should not have been induced to purchase Defendant's products based on an association with a trademark that Plaintiff exclusively owns. In light of the similarity of the marks, the directly competitive goods and services, and the parties' simultaneous use of the internet as a marketing channel, the use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among consumers.

(Lay Decl. ¶ 9, Exh. 8 (pp. 122-23).)[3] Plaintiff then goes on to repeat the same likelihood of confusion statement quoted above. But the facts do not support Plaintiff's likelihood of confusion allegation.

The trademark allegedly used is not identical in sight, sound and meaning to the VEGA mark Plaintiff has relied upon in this litigation. Plaintiff's registered mark is "VEGA;" the mark allegedly used on the screenshot, even in the best case scenario for Plaintiff, is "Xelement Extreme Vega," as Plaintiff alleges in its Second Amended Complaint. (Lay Decl. ¶ 7, Exh. 6 (p. 61).) The addition of the words "Xelement" and "Extreme" make the two alleged marks strikingly different in sight and sound, as well as meaning, whatever meaning Plaintiff may claim for its VEGA mark. Nor are the relevant products the same. Plaintiff's claims in this action have always been based upon Plaintiff's registration for the mark VEGA for motorcycle helmets, Reg. No. 2,087,637. (*See supra* pp. 2-3.) Despite filing three separate complaints in this action

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[3] Plaintiff gave identical responses to Interrogatories Nos. 8 and 9, except for the following addition in response to Interrogatory No. 9: "Since at least from April 2009 to the present, Defendant has had actual knowledge of Soaring Helmet's superior trademark rights. Thus, Defendant's continued infringement notwithstanding actual notice from Soaring Helmet constitutes intentional trademark infringement." (Lay Decl. ¶ 9, Exh. 8 (p. 129).)

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and responding to numerous interrogatories that sought an explanation of the factual basis for its claims, Plaintiff never clearly alleged in any of those documents that it used the VEGA mark in connection with or had a registration for VEGA for motorcycle jackets.[4] Thus, with reference to the VEGA mark Plaintiff pleaded, motorcycle helmets and motorcycle jackets are not the same products. The parties' customers also differ. Plaintiff markets and sells its VEGA helmets to dealers on a wholesale basis. (Lay Decl. ¶ 9, Exh. 8 (p. 115), ¶ 10, Exh. 9 (p. 159), ¶ 13, Exh. 12 (p. 189).) Defendant sells the Xelement jacket direct to consumers only through its website. (Bootesaz Decl. ¶ 3; Lay Decl. ¶ 10, Exh. 9 (p. 158), ¶ 19, Exh. 18 (pp. 209, 211-12).)

In addition, Plaintiff has no probative evidence of bad faith or actual confusion. Far from being evidence of bad faith, Defendant's actions since receiving Plaintiff's cease and desist letter are indicative of good faith. (Bootesaz Decl.¶ 5; Lay Decl. ¶ 4, Exh. 3 (pp. 35-36).) Nor can Plaintiff rely solely on Defendant's alleged knowledge of Plaintiff's VEGA mark for motorcycle helmets as evidence of bad faith. *See, e.g., PlayMakers, LLC v. ESPN, Inc.*, 297 F. Supp. 2d 1277, 1284 (W.D. Wash. 2003) ("[T]here is no presumption of bad faith just because someone knew that a senior user existed."), *aff'd*, 376 F.3d 894 (9th Cir. 2004). And Plaintiff's only allegation regarding actual confusion is the following:

> [I]n approximately December 2009, one of Plaintiff's sales representatives, Joy Loga, spoke on the telephone with Plaintiff regarding a product offered for sale on Defendant's Leatherup.com website. The product on Defendant's website was a

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[4] In response to requests for admission that Plaintiff emailed to Defendant on September 17, 2010 (the discovery cutoff in this case was September 20th), Plaintiff stated as follows:

> **REQUEST FOR ADMISSION NO. 2:** Admit that Plaintiff has not obtained a registration for the VEGA mark for use in connection with the sale of motorcycle jackets.
> **ANSWER:** Plaintiff has obtained a federal registration for VEGA TECHNICAL GEAR for "motorcycle helmets and protective clothing," therefore Plaintiff does not admit nor deny.

(Lay Decl. ¶ 13, Exh. 12 (p. 188).) Plaintiff produced a copy of this registration first alleged in this response by email on September 17, 2010, followed by a hard copy received on September 21, 2010. (Lay Decl. ¶ 17, Exh. 16.) But this was the first explicit reference to a registration for a "Vega"-formative mark purportedly used in connection with motorcycle jackets, which came literally at the close of discovery. Plaintiff never alleged this registration in any of its complaints, despite the fact that the application was filed in December 2008 and was registered in June 2009, ***nearly a year*** before Plaintiff filed its Second Amended Complaint that made the allegations regarding the Xelement jacket. Having failed to plead its reliance on this registration or even disclose its existence until the close of discovery, Plaintiff should be precluded from relying on this mark and registration.

But even if the Court were to excuse Plaintiff's unexplained failure to plead this mark and registration, VEGA TECHNICAL GEAR and the alleged mark "Xelement Extreme Vega" are likewise strikingly different in sight, sound and meaning.

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> motorcycle jacket sold under the designation, "Xelement Extreme Vega." The representative inquired as to whether Plaintiff was the manufacturer of the jacket.

(Lay Decl. ¶ 9, Exh. 8 (pp. 116, 132-33), ¶ 16, Exh. 15.)

Firstly, this alleged confusion is arguably inadmissible hearsay. *See* FED. R. EVID. 801, 802; *Avery Dennison Corp. v. Acco Brands, Inc.*, No. CV99-1877DT (MCX), 1999 WL 33117262, at *17-18 (C.D. Cal. Oct. 12, 1999); *Alchemy II, Inc. v. Yes! Entm't Corp.*, 844 F. Supp. 560, 570 n.12 (C.D. Cal. 1994). Secondly, even if admissible, the inquiry from Plaintiff's own sales representative is not relevant confusion. "'[T]he relevant confusion to be avoided is that which affects purchasing decisions, not confusion generally.'" *Echo Drain v. Newsted*, 307 F. Supp. 2d 1116, 1126-27 (C.D. Cal. 2003) (quoting *Sunenblick v. Harrell*, 895 F. Supp. 616, 631 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 684 (2d Cir. 1996)); *see also Lang v. Retirement Living Publ'g Co.*, 949 F.2d 576, 583 (2d Cir. 1991) (noting, in rejecting alleged confusion, "no evidence links the confusion . . . to any potential or actual effect on consumers' purchasing decisions"); *Mattel*, 28 F. Supp. 2d at 1148 ("The fact that a plaintiff can point to some evidence of confusion in the abstract does not automatically mean that such confusion affects actual purchasing decisions."). And "'[a]ttestations from persons in close association and intimate contact with [the trademark owner] do not reflect the views of the purchasing public.'" *Walter v. Mattel, Inc.*, 210 F.3d 1108, 1111 (9th Cir. 2000) (quoting *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 910 (9th Cir. 1995)).

Moreover, even if the inquiry had been from the relevant purchasing public, such an inquiry demonstrates that the person is not confused. *See, e.g., Cohn*, 281 F.3d at 842 n.7 (several dozen inquiries about whether the parties were related were "too ambiguous to demonstrate actual confusion"); *Duluth News-Tribune v. Mesabi Publ'g Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996) (question as to "which News-Tribune [reporter] worked for indicates a distinction in the mind of the questioner, rather than confusion"); *Miss World (UK) Ltd. v. Mrs. Am. Pageants, Inc.*, 856 F.2d 1445, 1451 (9th Cir. 1988) (inquiry about the existence of a pageant for married women was inconclusive as "[i]t might well indicate an understanding that a beauty pageant for married women was being offered by another source"), *abrogated in part on other*

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grounds by Eclipse, 894 F.2d at 1116 n.1; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23 cmt. c (2010) (Appendix B).

Finally, even if all these fatal flaws in Plaintiff's anecdotal evidence of actual confusion were disregarded, a single incident of purported confusion is de minimis and insufficient to create a genuine issue of material fact. *See, e.g.*, *Universal Money Centers, Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1535 (10th Cir. 1994) (concluding that employee affidavits, survey results and testimony from a customer were de minimis "isolated instances" of actual confusion and stating that "[d]e minimis evidence of actual confusion does not establish the existence of a genuine issue of material fact regarding likelihood of confusion"); *Glow Indus., Inc. v. Lopez*, 252 F. Supp. 2d 962, 999 (C.D. Cal. 2002) (two faxes and notes of employees were "not sufficient to support a general likelihood of confusion finding"); *Mattel*, 28 F. Supp. 2d at 1148 ("Nor does a showing of some actual confusion automatically create a triable issue of fact.").

As a result, Plaintiff cannot demonstrate a likelihood of confusion with respect to the Xelement jacket as a matter of law and Plaintiff's trademark infringement and false designation of origin claims on that issue should be dismissed accordingly.

b. Google AdWords Program.

As to Plaintiff's allegations regarding the keyword "Vega," when asked to detail the factual basis for its initial interest confusion claim, Plaintiff provided the same generic statement quoted above in connection with the Xelement jacket. (Lay Decl. ¶ 9, Exh. 8 (p. 118); *see supra* p. 9.) And, as noted above, as to Plaintiff's claim for false designation of origin, Plaintiff's statement of the purported factual basis for its allegations does not clearly distinguish between the allegations regarding the Xelement jacket and those relating to Google AdWords. (*See supra* p. 9.) But as with the Xelement jacket discussed above, Plaintiff cannot establish a likelihood of confusion as a matter of law with respect to the Google AdWords keywords.

Although Plaintiff's VEGA mark and the "Vega" keyword are the same in sight and sound, as discussed above, the parties' respective customers differ—Plaintiff's customers are retailers while Defendant's customers are consumers—and there is no evidence of bad faith

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intent on the part of Defendant. (*See supra* at p. 10.)

Nor does the only incident of purported actual confusion advance Plaintiff's likelihood of confusion claim:

> In approximately April 2009, a potential dealer of Plaintiff's products, Jim Squire of Holiday Powersports in Michigan Center, Michigan, refused to do business with Plaintiff after it performed a search of Plaintiff's VEGA mark on the Google search engine. The results of the dealer's Google search triggered an advertisement for Defendant, falsely stating that Defendant offered "50% off VEGA helmets." Holiday Powersports refused to become an authorized dealer of Plaintiff's products because they mistakenly believed that Plaintiff sold its products to "deep discount" online retailers.

(Lay Decl. ¶ 9, Exh. 8 (pp. 115-16, 132).) Again, this evidence is inadmissible hearsay as it is Plaintiff's statement of what another person purportedly said to Plaintiff and/or its counsel which is offered to prove the truth of the matter asserted, namely, that Holiday Powersports told Plaintiff it would not do business with Plaintiff purportedly because of a Google search that returned Defendant's Google AdWords advertisement. *See* FED. R. EVID. 801, 802. But even if this inadmissible hearsay evidence was considered, it is not sufficiently probative to create a genuine issue of material fact for trial. *See Universal Money Centers*, 22 F.3d at 1535.

In considering this single purported incident of actual confusion, the focus must be on the relevant type of confusion:

> Evidence of actual confusion must be examined in light of whether the defendant's mark is likely to confuse an appreciable number of *ordinary prudent purchasers* as to the source of the product in question. . . . In most cases, this will mean the ultimate consumer, not a retailer or wholesale buyer.

Sunenblick, 895 F. Supp. at 630-31. Here, Plaintiff has proffered no evidence of confusion from the ultimate consumer, has no expert or survey evidence indicating a probability of confusion, and instead effectively relies on a presumption of initial interest confusion based on the mere use of the word "Vega." (*See* Lay Decl. ¶ 11, Exh. 10 (p. 171), ¶ 12, Exh. 11 (p. 182).) To allow Plaintiff to proceed based only on such a presumption would subvert one of the primary purposes of the Lanham Act and effectively relieve Plaintiff of the burden of proving that any confusion was probable. *See Horphag*, 337 F.3d at 1040 (one purpose of federal trademark law is to protect against consumer confusion); *Rodeo Collection*, 812 F.2d at 1217 (confusion must "be

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probable, not simply a possibility"). Other courts have rejected such a proposition. *See Designer Skin, LLC v. S & L Vitamins, Inc.*, 560 F. Supp. 2d 811, 818-19 (D. Ariz. 2008) (concluding that mere use of marks in metatags and as search engine keywords "does not result in initial interest confusion," rather plaintiff must show that these uses are deceptive).[5]

Moreover, this single incident of purported confusion is ambiguous at best and alone is insufficient to demonstrate a genuine issue of fact for trial. Notably, although Plaintiff claims that the retailer performed a Google search that returned Defendant's Google AdWords ad and that the retailer refused to become a dealer of Plaintiff's products based on a belief that "Plaintiff sold its products to 'deep discount' online retailers," Plaintiff does not explicitly connect these two allegations. In other words, Plaintiff does not state that the retailer refused to become a dealer of Plaintiff's products because of *Defendant* or its Google AdWords ad specifically. Given that Google search results (both those attached as an exhibit to Plaintiff's Second Amended Complaint and those performed recently by Defendant's counsel (*see* Lay Decl. ¶ 15, Exh. 14, ¶ 18, Exh. 17), return ads from other third parties touting large discounts on VEGA helmets, the retailer's alleged refusal to do business with Plaintiff could have just as reasonably been based on these other "deep discount online retailers" and therefore had nothing to do with any use of the word "Vega." And notably, Plaintiff does not even identify the retailer in its initial disclosure of individuals likely to have discoverable information. (Lay Decl. ¶ 5, Exh. 4 (p. 40).) In short, this alleged incident is simply too ambiguous to support the conclusion that it reflects actual confusion resulting from Defendant's alleged use of Plaintiff's mark.

In sum, despite ample opportunity to marshal evidence and develop its case, Plaintiff cannot proffer sufficient probative evidence to demonstrate a probable likelihood of confusion with respect to either the Xelement jacket or Google AdWords as a matter of law. As a consequence, summary judgment should be entered in Defendant's favor on Plaintiff's claims for

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[5] The court also found that initial interest confusion did not exist merely because defendant's websites might receive higher priority than the plaintiff's in search results because "[l]iability only attaches for trademark infringement when conduct is 'likely to confuse an *appreciable* number of people as to the source of the product.'" *Designer Skin*, 560 F. Supp. 2d at 819 (quoting *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002)).

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trademark infringement and false designation of origin, the first and second causes of action in Plaintiff's Second Amended Complaint.

3. False Advertising.

Any claim by Plaintiff for false advertising under the Lanham Act cannot withstand summary judgment due to a similar dearth of evidentiary support. Even assuming that Plaintiff could establish the falsity element with respect to the Google AdWords advertisement upon which any false advertising claim appears to be based, Plaintiff has no probative evidence to demonstrate either material deception or any injury caused by such purported deception.

As to material deception, Plaintiff must prove both (1) that the challenged statement actually deceived or had the tendency to deceive a substantial segment of its audience, and (2) that the deception was material in that it was likely to influence the purchasing decision. *Southland*, 108 F.3d at 1139. But Plaintiff has no evidence, such as survey evidence or expert testimony, to establish these elements. The only material Plaintiff appears to rely on is its allegation regarding the Michigan retailer who allegedly declined to become a dealer of Plaintiff's products. As discussed above with respect to the likelihood of confusion analysis however, the evidence pertaining to that allegation is ambiguous at best as to any cause and effect between the Google AdWords advertisement and the retailer's alleged decision not to sell Plaintiff's products. (*See supra* at p. 14.) In any event, a single, anecdotal allegation is hardly indicative of actual deception or the tendency to deceive "a substantial segment" of the advertisement's audience.

As to the injury and causation element, "[i]n a suit for damages under section 43(a), . . . actual evidence of some injury *resulting from the deception* is an essential element of the plaintiff's case." *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 210 (9th Cir. 1989); *see also Air Turbine Tech., Inc. v. Atlas Copco AB*, 410 F.3d 701, 709 (Fed. Cir. 2005) ("[F]alse advertising under the Lanham Act requires . . . a showing of both an injury and a causal link between the injury and the allegedly false advertising."). In cases such as this that do not involve comparative advertising, "the plaintiff must present evidence of an injury 'causally related to the

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defendant's deception.'" *Healthport Corp. v. Tanita Corp. of Am.*, 563 F. Supp. 2d 1169, 1181 (D. Or. 2008) (quoting *Harper House*, 889 F.2d at 209-10), *aff'd*, 2009 WL 1285235 (Fed. Cir. 2009); *see also Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1334 (8th Cir. 1997) ("[I]n cases where there is no comparative advertising involved, the plaintiff must shoulder the full burden of proof of both cause in fact and injury."); *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995) (to recover lost profits, a plaintiff "cannot establish causation unless it can show that the false statement . . . caused the damage by influencing [customers] to forego purchasing"); *Nat'l Prods., Inc. v. Gamber-Johnson LLC*, 699 F. Supp. 2d 1232, 1241 (W.D. Wash. 2010) (presumption of injury limited to cases of direct comparative advertising).

But here, Plaintiff's "evidence" of purported injury consists only of Plaintiff's allegation regarding the Michigan retailer and Plaintiff's own general statements that it believes it was injured. As to the latter, any such assertions are not evidence of injury. *See In re Century 21-Re/Max Real Estate Adver. Claims Litig.*, 882 F. Supp. 915, 925 (C.D. Cal. 1994) ("[A] claim for damages based on a plaintiff's opinion that it was injured provides no proof of injury."). And as to the former, as discussed above, Plaintiff's allegation of the statement of the Michigan retailer is ambiguous at best and therefore is not probative evidence establishing actual injury to Plaintiff (*see supra* at p. 14). *See Nat'l Prods., Inc. v. Gamber-Johnson LLC*, No. C08-0049JLR, 2010 WL 3230921, at *3 (W.D. Wash. Aug. 13, 2010) ("The court should ensure that the damage award is based on actual evidence of injury from the deceptive advertising."); *Societe Civile Succession Richard Guino v. Beseder Inc.*, No. CV 03-1310-PHX-MHM, 2007 WL 3238703, at *4 (D. Ariz. Oct. 31, 2007) (noting that although recent Ninth Circuit authority suggests that damages may be evaluated under the "totality of the circumstances," "evidence of some damage or harm to a Lanham Act plaintiff is still required to justify such an award").

Moreover, even if Plaintiff were to seek only injunctive relief, although "a competitor need not prove injury when suing to enjoin conduct that violates section 43(a)," *Harper House*, 889 F.2d at 210, the statute does demand "proof providing a reasonable basis for the belief that the plaintiff is likely to be damaged as a result of the false advertising," *Johnson & Johnson v.*

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Carter-Wallace, Inc., 631 F.2d 186, 190 (2d Cir. 1980). But it is undisputed that Defendant voluntarily changed its Google AdWords campaign to delete any reference to the word "Vega" after receiving Plaintiff's cease and desist letter and Plaintiff offers no evidence to suggest that Defendant will re-commence use. (Lay Decl. ¶ 7, Exh. 6 (p. 61), ¶ 13, Exh. 12 (p. 189).)

C. Plaintiff Has No Evidence to Support a Monetary Recovery or Injunctive Relief for Trademark Infringement or False Designation of Origin.

Even assuming Plaintiff could establish a violation of its rights under either Section 35 or Section 43(a) of the Lanham Act, summary judgment is appropriate on Plaintiff's claim for damages as the result of a lack of proof. Nor can Plaintiff justify an injunction directed toward conduct that Plaintiff admits stopped long ago.

Section 1117 of the Lanham Act provides the measure of damages in a civil action:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) . . . of this title . . . shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and *subject to the principles of equity*, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

15 U.S.C. § 1117(a) (emphasis added).

An award of damages under the Lanham Act is not a matter of right: "The equitable limitation upon the granting of monetary awards under the Lanham Act . . . would seem to make it clear that such a remedy should not be granted as a matter of right." *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 120 (9th Cir. 1968); *see also Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 620 (9th Cir. 1993) (awards are never automatic and may be limited by equitable considerations); *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir. 1993) ("[A] determination of damages in a trademark infringement action, including an accounting, is to be pursued in light of equitable considerations."). Thus, "[w]hen fashioning a remedy in a given case, the court must rely 'not merely on the legal conclusion of liability, but [must] also . . . consider the nature of the infringing actions, including the intent with which they were motivated and the actuality, if any, of their adverse effects upon the aggrieved party.'" *Lindy Pen*, 982 F.2d at 1405 (quoting *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 918

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(Fed. Cir. 1984)); *see also Nat'l Prods.*, 2010 WL 3230921, at *3 ("[T]he district court must determine damages in a Lanham Act action in light of equitable considerations.").

As to Plaintiff's own purported damages, Plaintiff "must prove both the fact and the amount of damage." *Lindy Pen*, 982 F.2d at 1407. Although a plaintiff is "not required to prove [its] damages with exactitude, there must be some reasonable basis on which the Court may frame a remedy." *Lindy Pen Co. v. Bic Pen Corp.*, 14 U.S.P.Q.2d 1528, 1533 (C.D. Cal. 1989), *aff'd*, 982 F.2d 1400 (9th Cir. 1993); *see also Lindy Pen*, 982 F.2d at 1407 ("As a general rule, damages which result from a tort must be established with reasonable certainty."). But Plaintiff "cannot meet [its] burden of proof by mere speculation." *Lindy Pen*, 14 U.S.P.Q.2d at 1533.

Here, Plaintiff does not even speculate as to its own alleged damages. Plaintiff was asked to detail each category of damage it claimed to have suffered, including the computation of the amount of damages as well as to detail the computation of any claimed lost sales and produce documentation supporting those computations. (Lay Decl. ¶ 8, Exh. 7 (p. 105), ¶ 9, Exh. 8 (pp. 146-47).) But Plaintiff failed to do so and instead responded in generalities with no reference to supporting documentation:

> Plaintiff has suffered damages arising out of the lost dealer in Michigan and lost sales arising out of initial interest confusion. Damages will be calculated based on either: i) the average amount of dealer purchases in Michigan; ii) the average amount of dealer purchases nationwide; or iii) the amount of defendant's profits.

(Lay Decl. ¶ 9, Exh. 8 (p. 146).) Such a response is no evidence at all and Plaintiff therefore has no evidence to establish its damages with any certainty, much less reasonable certainty. Moreover, Plaintiff's response does not even suggest any damages with respect to the Xelement jacket. Therefore, Defendant is entitled to summary judgment on any claim Plaintiff may make for an award of its own damages.

As to a claim for an accounting of Defendant's profits, such a "remedy is not available as a matter of right." *Friend v. H.A. Friend & Co.*, 416 F.2d 526, 534 (9th Cir. 1969); *see also Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 131, 67 S. Ct. 1136, 91 L. Ed. 1386 (1947) (rule governing accounting of profits did "not stand for the proposition that an accounting will be

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ordered merely because there has been an infringement"). Rather, as with other forms of monetary awards, the award of profits under the Lanham Act is "subject to the principles of equity." 15 U.S.C. § 1117(a). *See also Lindy Pen*, 982 F.2d at 1405; *Faberge, Inc. v. Saxony Prods., Inc.*, 605 F.2d 426, 429 (9th Cir. 1979). And, "[w]hen awarding profits, the court is cautioned that the 'Plaintiff is not . . . entitled to a windfall.'" *Lindy Pen*, 982 F.2d at 1405 (quoting *Bandag*, 750 F.2d at 918).

In addition, where, as here, Plaintiff seeks an award of defendant's profits under a theory of unjust enrichment, Plaintiff is required to prove willful infringement. *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 988 (9th Cir. 1995) (instruction that willful infringement is required for an award of defendant's profits was appropriate where plaintiff disclaimed an intent to seek damages based on lost sales); *see also Lindy Pen*, 982 F.2d at 1405 ("The intent of the infringer is relevant evidence on the issue of awarding profits and damages and the amount."). Moreover, even "[w]illfull infringement may support an award of profits to the plaintiff, but does not require one." *Faberge*, 605 F.2d at 429.

Here, Plaintiff apparently claims an entitlement to Defendant's profits under a theory of unjust enrichment. In response to an interrogatory requesting Plaintiff to detail each category of damage it claims to have incurred, Plaintiff stated, in relevant part: "Because proof of actual damage is often difficult, a court may award damages based solely on defendant's profits on a theory of unjust enrichment." (Lay Decl. ¶ 9, Exh. 8 (p. 146).) Plaintiff provided an identical response to an interrogatory requesting Plaintiff's computation of any claimed lost sales. (Lay Decl. ¶ 9, Exh. 8 (p. 147).) Thus, in order to establish a right to an accounting of Defendant's profits, Plaintiff must, but cannot, prove willful infringement.

"Willful infringement carries a connotation of deliberate intent to deceive." *Lindy Pen*, 982 F.2d at 1406 (noting that labels such as "deliberate," "false," "misleading" and "fraudulent" have been applied to such conduct). The Ninth Circuit has also "cautioned that an accounting is proper only where the defendant is 'attempting to gain the value of an established name of another.'" *Lindy Pen*, 982 F.2d at 1406 (quoting *Maier Brewing*, 390 F.2d at 123). *See also*

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Lindy Pen, 14 U.S.P.Q.2d at 1530 ("[W]here there is no intent to capitalize on the trade name of another, an accounting of profits is not warranted."). "Willfulness and bad faith 'require a connection between a defendant's awareness of its competitors and its actions at those competitors' expense.'" *Lindy Pen*, 982 F.2d at 1406 (quoting *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 966 (D.C. Cir. 1990)). But "[i]nfringement is not willful if the defendant 'might have reasonably thought that its proposed usage was not barred by the statute.'" *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1300 (9th Cir. 1998) (quoting *Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 738-39 (9th Cir. 1986), *aff'd*, 483 U.S. 522 (1987)). Similarly, the Ninth Circuit has cited to the Sixth Circuit's statement "that a knowing use in the belief that there is no confusion is not bad faith." *Lindy Pen*, 982 F.2d at 1406 (citing *Nalpac, Ltd. v. Corning Glass Works*, 784 F.2d 752, 755 (6th Cir. 1986)).

Plaintiff has alleged that there was willful infringement because "[s]ince at least from April 2009 to the present, Defendant has had actual knowledge of Soaring Helmet's superior trademark rights" but purportedly engaged in "continued infringement." (Lay Decl. ¶ 9, Exh. 8 (p. 129).) But the undisputed facts—including Plaintiff's own admissions—do not support such an allegation. (Lay Decl. ¶ 7, Exh. 6 (p. 61), ¶ 13, Exh. 12 (p. 189).) To the contrary, as described above, the facts reflect that Defendant acted in good faith to respond to Plaintiff's professed concerns even before Plaintiff elected to pursue litigation. (*See supra* p. 3.) Far from being evidence of willful infringement, such undisputed facts demonstrate Defendant's good faith attempts to resolve Plaintiff's claim. And again, Plaintiff's allegations regarding damages do not even reference the Xelement jacket, much less offer any evidence supporting a claim that there was willful infringement. Such a complete absence of evidence cannot support a claim for Defendant's profits based on an allegation of willful infringement.

Any claim for injunctive relief also lacks an evidentiary or equitable basis in light of the acknowledged fact that Defendant stopped any alleged unlawful conduct as described in Plaintiff's Second Amended Complaint with respect to both Google AdWords and the Xelement

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jacket. (*See supra* pp. 3-4.) With no demonstrable threat of irreparable harm in the future, equity does not support granting injunctive relief to Plaintiff. *See Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 410 (9th Cir. 1976) ("The prime prerequisite for injunctive relief is the threat of irreparable future harm."); *Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350, 352 (9th Cir. 1969) (finding no error in trial court's refusal to issue an injunction where there was "little or no evidence in the record casting doubt on [the] good faith abandonment of this infringement, or indicating that it will be resumed").

In the face of this evidentiary vacuum, Defendant is entitled to summary judgment on Plaintiff's claim for damages and/or injunctive relief under the Lanham Act.

D. Plaintiff's Failure of Proof As to Its Lanham Act Claims Likewise Dooms Its Washington Consumer Protection Act Claim.

To establish a private action under Washington's Consumer Protection Act, RCW 19.86.010 *et seq.* ("CPA"), Plaintiff must prove five elements: "(1) an unfair or deceptive act or practice; (2) occurring in trade or practice; (3) affecting the public interest; (4) injuring the plaintiff's business or property; and (5) a causal link between the unfair or deceptive acts and the injury suffered by plaintiff." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 733 (2007). As Plaintiff has acknowledged in its discovery responses (*see* Lay Decl. ¶ 9, Exh. 8 (pp. 130, 133, 135, 137-38)), "[a]bsent unusual or unforeseen circumstances, the analysis of a CPA claim will follow that of the trademark infringement and unfair competition claims: it will turn on the likelihood of consumer confusion regarding a protectable mark." *Lahoti v. Vericheck, Inc.*, 708 F. Supp. 2d 1150, 1168 (W.D. Wash. 2010). *See also eAcceleration Corp. v. Trend Micro, Inc.*, 408 F. Supp. 2d 1110, 1114 (W.D. Wash. 2006). Thus, as with Plaintiff's trademark infringement and false designation of origin/unfair competition claims under the Lanham Act, Plaintiff's claim for violation of Washington's CPA cannot withstand summary judgment.

E. Plaintiff's Tortious Interference With Prospective Economic Advantage Claim Suffers From a Fatal Lack of Proof.

In Washington, to prove intentional interference with a business expectancy, Plaintiff must establish: (1) the existence of a valid contractual relationship or business expectancy; (2)

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that defendant had knowledge of that relationship or expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resulting damages. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 28 (1992).

As to the first element, Plaintiff "must show that the future opportunities and profits are a reasonable expectation and not based on merely wishful thinking." *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 805 (1985). Although an "existing enforceable contract" is not required, it is necessary that there be "a relationship between parties contemplating a contract, with at least a reasonable expectancy of fruition. And this relationship must be known, or reasonably apparent, to the interferor." *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85 (1971). As to Plaintiff's allegations regarding the Xelement jacket, Plaintiff has failed to offer evidence establishing with any specificity the "business expectancy" of which Defendant was purportedly aware and with which it allegedly interfered. Plaintiff's Second Amended Complaint merely alleges generally that "Soaring Helmet's right to obtain prospective customers constitutes a valid business expectancy." (Lay Decl. ¶ 7, Exh. 6 (p. 67).) But such "a formulaic recitation of the elements of a cause of action will not do" even at the pleading stage and Plaintiff has since provided no evidence to buttress its formulaic allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "To show a relationship between parties contemplating a contract, it follows that we must know the parties' identities." *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 353 n.2 (2006). Plaintiff, however, has failed to make such a specific identification and therefore cannot prove either the first or second elements of its tortious interference claim with respect to the Xelement jacket. *See Pac. Nw. Shooting Park*, 158 Wn.2d at 352-53 (concluding that plaintiff had failed to tie alleged losses to "*specific relationships*" between plaintiff and "identifiable third parties").

Plaintiff also cannot establish that Defendant intentionally interfered or that there was any termination of the unspecified business expectancy that resulted in damage to Plaintiff with respect to either the Xelement jacket or Google AdWords allegations.

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Interference is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158 (2002) (internal quotation marks omitted), *rev'w granted*, 148 Wn.2d 1021 (2003). Interference alone is insufficient; rather, intentional interference "requires an improper objective or the use of wrongful means." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157 (1997); *see also Apollo, Inc. v. Parsons Infrastructure & Tech. Group, Inc.*, No. CV-03-5095-RHW, 2005 WL 1405029, at *8 (E.D. Wash. June 15, 2005) ("Plaintiffs also must show that Defendant pursued an improper objective of harming the Plaintiffs or used wrongful means that, in fact, caused injury to Plaintiffs' contractual or business relationships."). "Interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession." *Newton*, 114 Wn. App. at 158.

As to the Xelement jacket, in response to interrogatories asking Plaintiff to detail the purported factual basis for its tortious interference allegations, including facts supporting its claim that it had been damaged, Plaintiff gave a rote, form response:

> In this case, Plaintiff had a reasonable and valid expectation that potential customers searching for Soaring Helmet's VEGA trademark would not be lured to a website that does not in fact sell any of Soaring Helmet's products. Defendant knew or at the very least, should have known that its use of Plaintiff's VEGA mark would interfere with Plaintiff's right to obtain prospective customers. Defendant intentionally interfered with Soaring Helmet's business expectancy because the luring of Soaring Helmet's potential customers to the Leatherup.com website was certain or at the very least, substantially certain to occur as a result of Defendant's use of the VEGA mark.

(Lay Decl. ¶ 9, Exh. 8 (pp. 141, 143, 145).) This generic assertion, without specific facts identified with respect to the Xelement jacket, simply cannot demonstrate a genuine issue of material fact for trial as no reasonable fact finder could find for Plaintiff based on such "evidence." *See Anderson*, 477 U.S. at 249 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."). And the only other information Plaintiff has proffered relating to the Xelement jacket is the

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allegation that one of Plaintiff's own sales representatives inquired whether Plaintiff manufactured the jacket. (Lay Decl. ¶ 9, Exh. 8 (pp. 116, 132-33).) But this inquiry from Plaintiff's own representative is wholly irrelevant to the tortious interference claim; it proves nothing about termination of a business expectancy or any damages resulting from termination.

Plaintiff's non-specific and conclusory interrogatory responses also are not sufficient evidence from which a verdict could be rendered in Plaintiff's favor on the Google AdWords allegations. (Lay Decl. ¶ 9, Exh. 8 (pp. 141, 143, 145).) Plaintiff's responses are no more than an abbreviated re-statement of the general allegations in the Second Amended Complaint, which is insufficient to defeat Defendant's properly-supported summary judgment motion. *See Anderson*, 477 U.S. at 256 (non-moving party cannot defeat summary judgment by relying on the mere allegations of its pleadings). The tortious interference claim fails even considering Plaintiff's allegation with respect to the Michigan retailer. As discussed above (*see supra* pp. 13-14), not only is this evidence inadmissible hearsay but it also fails to establish (1) that the Michigan dealer was in fact a reasonable expectancy or (2) that Defendant's use of the word "Vega" was the cause in fact of the alleged loss of this business. Even if one were to accept such "evidence" at face value, at most it is no more than a "scintilla" of anecdotal evidence, which is insufficient to withstand summary judgment. *Anderson*, 477 U.S. at 252.

As a result, Plaintiff's claim for tortious interference claim also fails as a matter of law.

DATED this 3rd day of November, 2010.

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of eighteen years and am not a party to the within action. My business address is Hendricks & Lewis PLLC, 901 Fifth Avenue, Suite 4100, Seattle, Washington 98164.

I hereby certify that on November 3, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed November 3, 2010, at Seattle, Washington.

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